SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1941

No.....

VERNON J. BROWN, THEODORE I. FRY, HARRY F. KELLY, and LOUIS M. NIMS, comprising the MICHIGAN STATE BOARD OF TAX ADMINISTRATION, and VERNON J. BROWN, as Auditor General of the State of Michigan, THEODORE I. FRY, as State Treasurer of Michigan, HARRY F. KELLY, as Secretary of State for Michigan, and LOUIS M. NIMS, as Managing Director of said STATE BOARD OF TAX ADMINISTRATION, Petitioners,

v.

J. B. SIMPSON, INC., an Illinois corporation.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

STATEMENT OF CASE

The facts of this case are stated adequately in the petition for certiorari.

The immediate question for decision is whether this Court has probable jurisdiction to grant the review sought by the State of Michigan.

It may be conceded that the state court construed the Michigan 'Use Tax Act', that we are bound thereby, and

if the decision rendered below turned entirely upon this or any other non-federal point, the writ of certiorari should be denied.

We respectfully submit that the court, after interpreting the local statute, was still of the opinion that, because of the commerce clause of the Federal Constitution, the 'Use Tax Act' could not be applied to the respondent.

Our position, then, is that the Michigan 'Use Tax Act', as construed by the state court, nonetheless, and without interference with interstate commerce, imposes upon respondent the duty to collect the tax levied upon its Michigan buyers.

II

ARGUMENT

POINT ONE

The Michigan 'Use Tax Act', as construed by the state court, and as sought to be applied to J. B. Simpson, Inc., places no burden on interstate commerce.

The state court, in companion cases decided the same day, held that the use tax is not upon interstate commerce, but upon the privilege of use after the commerce is at an end, hence is not a transgression of the power of congress to regulate interstate commerce,

Banner Laundering Co. v. State Board of Tax Administration, 297 Mich. 419, 298 N.W. 73.

In the *Simpson case* [the cause at bar], the state court held the language of the act to mean that the only sellers charged with the duty of collecting the tax were those 'engaged in the business of selling at retail in this state' [§ 5, 'Use Tax Act'].

The State takes the position that, even so construed, the Michigan 'Use Tax Act', as sought to be applied to respondent, imposes no burden on interstate commerce.

We maintain that recent decisions of this Court, to that general effect, control,

> *Felt & Tarrant Mfg. Co. v. Gallagher,* 306 U.S. 62,
> *So. Pac. Co. v. Gallagher,* 306 U.S. 167,
> *McGoldrick v. Berwind-White Coal Min. Co.,* 309 U.S. 33,
> *McGoldrick v. Felt & Tarrant Mfg. Co.* 309 U.S. 70,
> *Nelson v. Sears, Roebuck & Co.,* 312 U.S. 359, and
> *Nelson v. Montgomery Ward & Co.,* 312 U.S. 573.

POINT TWO

Since it is admitted to do business, maintains a branch office, and employs salesmen in this State to solicit orders from Michigan residents, J. B. Simpson, Inc., constitutionally may be compelled to collect from its Michigan customers the tax imposed upon them by the 'Use Tax Act'.

The facts submitted to the Court closely parallel those involved in the California 'Use Tax Case',

> *Felt & Tarrant Mfg. Co. v. Gallagher,* 306 U.S. 62.

There, as here, an Illinois corporation was engaged in manufacturing and selling articles of trade in that state

and delivering them to purchasers in various parts of the Union.

It employed agents in the state of California, paying them on a commission basis and paying the rent of an office for each general agent. As this court said,

> "All orders taken must be submitted to and approved by plaintiff, all sales and deliveries must be made by, and all bills for such orders as are accepted must be rendered by, the plaintiff. The general agent is prohibited from making collections and all payments must be made directly to plaintiff . . ."

Again,

> "As soon as an order is accepted a particular machine is appropriated for that purpose in plaintiff's shipping department in Illinois. All machines sold for delivery in California are shipped from one of plaintiff's distributing points outside the state. Sometimes machines are forwarded directly to the purchaser, while in other instances, in order to secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers. The only machines kept by plaintiff in California are those used as demonstrators. *Plaintiff has never qualified to do intrastate business in California*". [Emphasis, ours].

On the basis of such facts, the California 'Use Tax Act', directing 'retailers maintaining a place of business in the state, and making sales of tangible personal property for storage, use or other consumption therein, to collect from the purchaser the tax imposed', was sustained by this Court.

We respectfully submit that the *Felt & Tarrant* case controls the questions presented in this cause by the petition for writ of certiorari.

POINT THREE

[A] Although the state court construed the Michigan 'Use Tax Act', it based decision upon the 'commerce clause', and hence probability of jurisdiction is indicated.

The duty of collecting the use tax in Michigan is placed upon 'every seller .... engaged in the business of selling at retail in this state' [§ 5].

Section 2 [d] of the act defines the term 'seller' to mean 'the person from whom a purchase is made and includes every person engaged in this state *or elsewhere* [Italics, ours] in the business of selling tangible personal property for storage, use, or other consumption in this state'.

The court held this definition to be without force in the present instance 'for the quoted enactment, by its specific terms, only applies to sellers of "tangible personal property for storage, use or other consumption in this state, engaged in the business of selling at retail in this state".

Accepting as final this judicial interpretation of § 5 of the Michigan 'Use Tax Act', limiting its application to those 'engaged in the business of selling at retail in' that state, it nonetheless appears that the court's decision was largely, if not entirely, controlled by constitutional principles and, more especially, the commerce clause.

[B] The earlier decision upon which the state court relied [J. B. Simpson, Inc. v. O'Hara, 277 Mich. 55], is 'probably not in accord with (subsequent) applicable decisions of this Court' [Rule 38, par. 5 (a)].

In the first case of *Simpson*, 277 Mich. 55, 59, the court held that the Simpson corporation was not liable for the sales tax because, as was then said,

> "Both by the language of the statute and the terms of the order, the parties contemplate that the title to the clothing passes in the State of Illinois when delivery is made to the carrier at Chicago. Such a sale is not made in Michigan but in Illinois and being interstate commerce cannot be taxed by the State of Michigan".

The argument 'that failure to tax such transactions imposes a discriminatory handicap upon the local merchants of the state' was rejected on the ground that it had 'long since been answered and disposed of in *Robbins v. Shelby Taxing District*, 120 U.S. 489'.

Speaking of the *Robbins* case, the supreme court of appeals of Virginia has observed:

> "In recent years, there has been a gradual relaxation and modification of the strict and narrow interpretation applied in the above case as to the purpose of the commerce clause. The decisions in many of the later cases are predicated upon the presence or absence of discrimination.
>
> Finally, the Supreme Court of the United States has declined to deny to the States the right to levy a tax upon interstate commerce merely because it is such commerce. The latest cases recognize and admit the right of the States to require such commerce to bear its fair share of the cost of local government, notwithstanding the fact that the exercise of such

right may, in some measure, affect the commerce or increase the cost of doing business. They declare that the purpose of the commerce clause is to allow interstate commerce to compete on a fair and equal basis with local commerce",

Dunston v. City of Norfolk (Va., 1941), 15 S.E. [2d], 86, 88.

In *Nelson v. Sears, Roebuck & Co., supra,* the respondent pointed to the fact that in its mail order business it was in competition with out-of-state mail order houses 'which need not and do not collect the tax on their Iowa sales'. This Court say:

"But those other concerns are not doing business in the state as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price".

Respondent in the case at bar has been licensed to do business in the state of Michigan; it maintains a branch office at which orders are received, the purchaser is measured for a suit of clothes, samples are kept, and bushelmen made minor alterations; it employs salesmen to solicit orders for clothing; and it has a local Michigan bank account in which are deposited moneys collected as payment for its merchandise, and upon which the main office at Chicago draws as it sees fit.

III

CONCLUSION

We respectfully submit that, because of the importance of the questions involved, the writ of certiorari should issue.

Respectfully submitted,

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